Supreme Court, U. S.
FILED
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DAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-57

DOUBLE "Q", INC.,

Petitioner,

v.

CECIL D. ANDRUS, SECRETARY OF INTERIOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

CECIL D. ANDRUS, SECRETARY OF INTERIOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Double "Q", Inc., the petitioner herein, prays that a Writ of Certiorari issue to review the Judgment and Orders of the United States Court of Appeals for the Sixth Circuit entered in this matter on March 25, 1980, and April 22, 1980.

OPINIONS BELOW

The March 25, 1980 Order of the United States Court of Appeals for the Sixth Circuit whose Judgment and Order is here sought to be reversed is unreported and is reprinted in the Appendix to this Petition at page 15. Also the Order overruling the Petition to re-hear was filed on April 22, 1980, and is printed in the Appendix hereto at page 17. The prior Opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, is also reprinted in the Appendix at page 18.

JURISDICTION

The Judgment and Order of the United States Court of Appeals for the Sixth Circuit was filed on March 25, 1980. A further Order Overruling the Petition to rehear which was timely filed was filed on April 22, 1980. The jurisdiction of this Honorable Court is invoked pursuant to 28 USC, Section 1254(1).

QUESTIONS PRESENTED

Whether the United States District Court was in error in failing to allow the Petitioner to introduce all relevant testimony concerning issues of fact in dispute which would prove Petitioner's innocence of the violations of the Federal Coal Mine Health and Safety Act of 1969 as amended, and the health and safety standards enforced by the Mine Enforcement and Safety Administration of the Department of the Interior. The effect of which would deny the Petitioner a right to a de novo trial as guaranteed to it under 30 USC, Section 819(a)(1). [Section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969].

STATUTES INVOLVED

"(a) Any order or decision issued by the Secretary or the Panel under this Act, except an order or decision under section 109(a) of this Act [30 USCS Section 819(a)], shall be subject to judicial review by the United States Court of Appeals for the circuit in which the affected mine is located or the United States Court of Appeals for the District of Columbia Circuit, upon the filing in such court within thirty days from the date of such order or decision of a petition by any person aggrieved by the order or decision praying that the order or decision be modified or set aside in whole or in part, except that the court shall not consider such petition unless such person has exhausted the administrative remedies available under this Act. A copy of the petition shall forthwith be sent by registered or certified mail to the other party and to the Secretary or the Panel, and thereupon the Secretary or the Panel shall certify and file in such court the record upon which the order or decision complained of was issued, as provided in Section 2112 of Title 28, United States Code [28 USCS Section 2112]." 30 USC Section 816(a)

"(b) The court shall hear such petition on the record made before the Secretary or the Panel. The findings of the Secretary or the Panel, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary or the Panel for such further action as it may direct." 30 USC Section 816(b). [Section 106 of the Federal Coal Mine Health and Safety Act of 1969]

"(a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provisions of this Act, except the provisions of Title 4 [30 USCS Sections 901-941], shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." 30 USC Section 819(a)(1).

"(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may

remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues,' except issues of fact which were or could have been litigated in review proceedings before a court of appeals under Section 106 of this Act [30 USCS Section 816], and upon the request of the respondent such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in Section 507(b) of Title 28 of the United States Code [28 USCS Section 507(b)], attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph." 30 USC Section 819(a)(4). [Section 109 of the Federal Coal Mine Health and Safety Act of 1969]

STATEMENT OF CASE

Cecil D. Andrus, Secretary of the Interior, United States Department of the Interior, filed a Petition for "Enforcement of Civil Penalty Assessment Order" in the United States District Court for Eastern District of Tennessee, at Knoxville. In this Petition, the Secretary sought to collect penalties from the Petitioner for alleged violations of regulations under the Federal Coal Mine Health and Safety Act of 1969 (30 USC Section 801, et seq). There were a total of 25 cited violations occurring over a four month period at the Petitioner's coal operations in Tennessee.

As the proceeding progressed, the Petitioner was granted a jury trial pursuant to 30 USC Section 819(a)(4). Shortly

before trial both the Secretary's representative and the Petitioner were asked by the Court to submit briefs as to what issues were to be submitted to the jury. Both the Secretary's representative and the Petitioner stated that the statute required upon request that all relevant issues of fact including whether or not a violation occurred be submitted to the jury.

The Trial Court by a Memorandum Opinion, Appendix at page 18, ruled that the statute only allowed review of the amount of the assessment and that the fact of whether or not the violation occurred was not a question for the jury.

The parties proceeded to trial with the only issues before the jury being the amount of the penalty for each alleged violation.

At the conclusion of the evidence the jury was instructed and retired to deliberate after which they returned and submitted their verdict form listing each alleged violation and the penalty for each, totalling $1,181.00.

After entry of the judgment from the United States District Court for the Eastern District of Tennessee, Northern Division sitting at Knoxville, the Petitioner perfected its Appeal to the United States Court of Appeals for the Sixth Circuit. An Order was filed by the United States Court of Appeals for the Sixth Circuit on March 25, 1980, affirming the decision of the lower court and holding in effect that the findings of fact of the Secretary and its Administrative Law Officer can only be reviewed by a direct appeal from the decision of the Secretary and its Administrative Officer to the Court of Appeals according to 30 USC 816 and that the petitioner could not relitigate these factual findings in an enforcement action under 30 USC Section 819(a)(4). A

Petition to re-hear was timely filed by the Petitioner and an Order overruling the Petition for Re-hearing was entered by the United States Court of Appeals, Sixth Circuit on April 22, 1980. It is from this ruling that the Petitioner files this Petiton seeking the review of this Court.

REASON FOR GRANTING WRIT

1. That the United States District Court for the Eastern District of Tennessee, Northern Division misconstrued the application of 30 USC Section 819(a)(4) and violated the procedural rights of the Petitioner in the introduction of the evidence of innocence of violation of certain regulations of the Coal Mine Health and Safety Act of 1969 Codified at 30 USC Section 801 et seq.

The Trial Court was obligated to grant the Petitioner a de novo hearing pursuant to 30 USC 819(a)(4) of all disputed issues of fact.

The Petitioner sought a de novo hearing on 25 cited violations pursuant to 30 USC Section 819(a)(4). The Petitioner can find no reported cases of jury trials under this act. Therefore, we must look strongly to the wording of the Act itself. The pertinent part reads as follows:

> ". . . The Court ***shall*** (emphasis supplied) consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a Court of Appeals under Section 106 of the Act [30 USC Section 816] and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to the jury. On the basis of the jury's findings, the Court shall determine the amount of the penalty to be imposed . . . ." 30 USC Section 819(a)(4).

Both the Petitioner and the Respondent were in agreement that the Federal Coal Mine Health and Safety Act of 1969, Section 109, requires a de novo review of the facts constituting the violation or the fact that they occurred. The Trial Court, however, ruled that the act required de novo review only of the amount of the penalties. (Memo Opinion District Court of November 11, 1977) Appendix, page 18.

It appears to be the position of the Trial Court that Section 106 of the act which is codified at 30 USC, Section 816(b), specifically limits factual review to the substantial evidence test and that Congress did not intend to have the standard of review vary depending on the type of order at issue. Congress intended to have facts of the same type as those received by appellate courts, under Section 816 reviewed under the same standard of review in the district courts under 30 USC 819 (Memo Opinion, District Court filed November 11, 1977) Appendix, page 18.

The Trial Court on page 6 of its Memorandum Opinion filed November 11, 1977 (Appendix, page 18), recognized that it had problems avoiding a de novo review. Through the exercise of legal gymnastics the Trial Court decided that since the appellate courts did not determine the amount of the penalty that this would be the extent of the review in the district court because it affects Defendant's pocketbook.

The Trial Court cited *National Ind. Coal Operator's Ass'n v. Kleppe*, 423 U.S. 388, ___ L.Ed.2d ___, 96 S.Ct. 809, by dictum that the United States Supreme Court intended that the trial be de novo as to penalty. Defendant calls the Court's attention to Footnote 3 of that Opinion where the Court said:

> The Government has suggested that trial de novo is available on the factual basis of the violation as well as on the amount of the penalty. The statutory scheme is less than clear on this matter. Compare Section 106, Section 109(a). See *Eastern Associated Coal Corp. v.*

Interior Bd. of Mine Operations Appeals, 491 F.2d 277 [CA 4 1974]. We need not reach the issue to dispose of this case.

On page 8 of the same Memorandum Opinion the Court stated that the Court will assume the administrative proceedings were not subject to de novo review. Also the Court on page 9 of the same opinion reasoned by the fact that Congress did not place in the wording of the statute complete de novo review that it meant that review was limited to only de novo review of the penalties.

The particular statute in question, 30 USC, Section 819(a)(4), reads in part:

". . . The Court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a Court of Appeals under Section 106 of this Act [30 USC, Section 816(a)] and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the Court shall determine the amount of the penalty to be imposed...."

By the very reading of the code section itself the intent of this statute is very clear. The Court shall consider de novo all relevant issues in dispute except those that had been litigated under a withdrawal order authorized by 30 USC 814 and which order has been reviewed by the United States Courts of Appeals on the record made before the Secretary or the Panel. 30 USC 816. There can be no de novo review of the issues introduced during a 30 USC 816 proceeding under the judicial review authorized under the provisions of 30 USC 819. In this particular case there has never been a withdrawal order issued and no proceedings have ever taken place before the United States Court of Appeals in any circuit.

Therefore, the Trial Court must have submitted all relevant issues of fact which are in dispute for the jury to decide. After submitting the factual questions to the jury

it was the Court's duty to determine the amount of the penalty rather than the jury. The Court was grossly in error in ever submitting the question of penalties to the jury under the provisions of 30 USC 819.

The legislative intent is shown from the Conference Report No. 91-761 STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE LEGISLATIVE HISTORY ON THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, U. S. Code Congressional and Administrative News Vol. 2, page 2587, Sec. 109, subsection 5:

> ". . . The corresponding provision of the House amendment required the Secretary to request the Attorney General to institute a civil action in a district court of the United States to collect the penalty. Such proceeding would be de novo.
>
> The conference agreement is similar to the Senate bill. The Court would hear the case de novo and determine all relevant issues, except issues of fact which were or could have been litigated before a Court of Appeals under Section 106. This provision recognizes that the facts involved in the civil penalty may already have been fully litigated by the Court of Appeals under Section 106 and should not be relitigated here. Also, in some cases, they could have been so litigated and were not. Upon the request of the respondent in the de novo proceeding, issues of fact not litigated under Section 106 which are in dispute must be submitted to a jury and, on the basis of the jury's finding, the Court would determine the amount of the penalty to be imposed. The Court has jurisdiction to enter a judgment enforcing the order or modifying it, or setting it aside, or remanding it to the Secretary."

The conference report leaves no doubt that Congress intended that there be a de novo hearing of all relevant issues that had not been reviewed under Section 106 of the Act.

In the case of *Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277 [CA 4 1974], and *Freeman Coal Mining Co. v. Interior Bd. of Mine Opr. App.*, 504 F.2d 741 [CA 7 1974], by dictum they are saying that the factors bearing on the issuance of a withdrawal order and its correctness cannot be relitigated under a Section 109(a) proceeding but in this case there was never a withdrawal order issued.

Petitioner has found only one case which by dictum really reaches the question in this case. In the case of *Lucas Coal Co. v. Interior Bd. of Mine Operations App.*, 502 F.2d 581, the Court at page 586 states the law:

> ". . . The Act clearly contains a number of provisions for review of administrative action taken under its authority against mine operators. Thus, Section 109 provides that all violations of mandatory safety standards require the imposition of a civil penalty. The amount of the penalty is determined after a decision by the secretary that a violation did in fact occur. A failure by an affected mine operator to pay the penalty requires the Secretary to file a petition for enforcement in a district court which then considers de novo all relevant issues not previously considered by a Court of Appeals under Section 106. And one of the issues would be the fact of violation."

This case leaves no doubt that the Petitioner was entitled to a de novo hearing on all the relevant facts and that the Trial Court was in error in refusing to grant to the

Petitioner such a hearing. The Court was further in error in limiting the Petitioner in its proof and further instructing the jury that they are to consider only the amount of the penalty rather than if the Petitioner was guilty of a violation under the Act. Petitioner insists that this Honorable Court under the law cited has no other avenue but to reverse the Trial Court and send this cause back for a new trial.

The Court of Appeals was wrong in the interpretation of the application of 30 USC Section 816 [Section 106 of the Federal Coal Mine and Safety Act of 1969] because judicial review is applicable there where there would be mandatory closing of the mine if the safety regulations are to the point of being considered dangerous and the mine would be shut down. Otherwise the procedures for contesting any violation is through a hearing before an Administrative Judge and relitigating the violations in a proceeding under Section 109(a)(4) in the United States District Court in which the mining company would be entitled to a hearing on relevant issues of facts concerning any violations made by the coal operator. To take the interpretation of the panel of the Sixth Circuit Court of Appeals in the instant case would have a ping pong effect whereby the issues of facts would be appealed directly to the Court of Appeals from a decision of the Secretary of the Interior or his authorized representative, to-wit the Administrative Law Judge, directly to the Court of Appeals and after all issues of fact had been decided by the Court of Appeals on appeal then sent back to the Secretary of Interior for enforcement. In the event that the Secretary of Interior is unable to collect the penalties through the negotiation process, then in that instance, the Secretary would go to the United States District Court for collection and then once again a hearing could be heard on all issues of fact that

are disputed that had not been decided by the United States Court of Appeals. Such is not the intent of Sections 106 and 109 of the Federal Coal Mine Health and Safety Act of 1969 but is the interpretation placed in it by the United States Court of Appeals for the Sixth Circuit. Section 106 which was codified at 30 USC 816, specifically provides as follows:

> "(a) Any order or decision issued by the Secretary or the Panel under this act, *except an Order or decision under Section 109(a) of the act* [*30 USC Section 819(a)*] (emphasis supplied) shall be subject to judicial review by the United States Court of Appeals for the circuit in which the affected mine is located. . . ."

The violations involved here and the issues involved fall clearly under Section 109 of the Act which was codified at 30 USC Section 819. There was never any judicial review of the facts as contended under Section 106 of the Federal Coal Mines Health and Safety Act of 1969 [30 USC 106]. Because the Petitioner in this matter was never threatened with an immediate shut down of its mine, the Court of Appeals concluded that an offending party cannot relitigate these factual findings in an enforcement action under Section 109 to collect penalties, clearly was an error.

The Honorable Court of Appeals wholly misapplied the law in concluding that a jury was not required. The findings of fact are absolutely important in this case in dealing with the negligence or good faith of the petitioner herein. The Trial Court limited the proof of the Petitioner in such a way that it was a taking of the Petitioner's property without due process.

This is the first and only case of this nature that has reached the appeilate level of the Federal Courts. The

Petitioner is aware of one other case that was decided in the United States District Court for the Eastern District of Tennessee, Northern Division and is only aware of one other case being in the United States District Court in Pennsylvania where this specific issue has been litigated. However there is pending various violations still against the Petitioner under the old Federal Coal Mine Health and Safety Act of 1969 and your Petitioner potentially could be prosecuted under that act and there are numerous violations throughout the United States that still could be litigated. Therefore, there is presented an important question of law which has never been decided by this Court, that should be decided by this Court because of the misinterpretation of the law not only by the United States District Court for the Eastern District of Tennessee, Northern Division but by the United States Court of Appeals, Sixth Circuit. To allow the interpretation as the Sixth Circuit Court of Appeals has placed on the Act would unduly burden the already overworked Appellate system of our Federal Court system.

CONCLUSION

WHEREFORE, Petitioner respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

DOUBLE "Q", INC.

A. BENJAMIN STRAND, JR.
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ATTORNEYS FOR PETITIONER
P. O. DRAWER H
DANDRIDGE, TENNESSEE 37725

APPENDIX

No. 78-1153

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL D. ANDRUS,
Plaintiff-Appellee

v.

DOUBLE "Q", INC.,
Defendant-Appellant

ORDER

(Filed March 25, 1980)

BEFORE: WEICK, LIVELY AND JONES, Circuit Judges

At issue is the entitlement of appellant Double "Q", Inc. under 30 U.S.C. §819(a)(4) to a de novo jury trial on the facts of numerous violations of the Coal Mines Health and Safety Act, 29 U.S.C. §801, et seq., in an action brought by the Secretary of the Interior to enforce civil penalties. The district court held that §819(a)(4) did not provide for a de novo trial on the factual findings of violations and only permitted de novo review of the amount of the civil penalties. We affirm.

The district court thoroughly discussed the statutory language, legislative history and relevant case law. Upon review of these sources, we are convinced that the district court correctly interpreted §819(a)(4). Review of the Secretary's factual findings of violations should proceed ac-

cording to §816. An offending party cannot relitigate these factual findings in an enforcement action under §819(a)(4) to collect the civil penalties.

[2]

The district court submitted the question of the amount of penalty for each violation to a jury. The district court then reviewed the jury's verdict and entered judgment. We read §819(a)(4) as requiring the district court to determine the amount of penalty. The jury's role under §819(a)(4) is limited to making any necessary findings of fact relevant to the amount of the penalty, such as the negligence or good faith of the coal mine operator, 30 U.S.C. §819(a)(1), or any unresolved questions of fact which were not or could not have been litigated in review proceedings before the court of appeals pursuant to §816. Because such findings of fact were not necessary in this case, a jury was not required. We also believe that the use of a jury was not advisable, because its presence tended to confuse responsibility for the determination of the amount of the penalty. However, we find no basis for reversible error because the district court determined in the last instance the amount of the civil penalties. Therefore, a remand would serve no useful purpose.

The district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: May 1, 1980
COSTS: NONE

No. 78-1153

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL D. ANDRUS,

Plaintiff-Appellee

v.

DOUBLE "Q", INC.,

Defendant-Appellant.

ORDER

(Filed April 22, 1980)

Decided and filed _____

BEFORE: WEICK, LIVELY and JONES, Circuit Judges

Upon consideration of appellant's petition for rehearing, the Court is of the opinion that no new arguments are presented and that its previous Order is correct. Therefore, the petition for rehearing is denied.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CECIL D. ANDRUS, Secretary of the Interior, Petitioner	)	
v.	)	CIV. 3-77-347
DOUBLE "Q", INC., Respondent	)	

MEMORANDUM

(Filed November 11, 1977)

This case presents the question of whether the Federal Coal Mine Health and Safety Act of 1969 requires the District Court to review de novo, in an enforcement proceeding to collect civil penalties, the factual basis of the violations which resulted in the assessment of the penalties, in addition to a de novo review of the amount of those penalties.

The Secretary of the Interior, petitioner herein, represented in this Court by the Attorney General, maintains that the Act requires de novo review of the facts constituting the violations.[1]

Similarily, the respondent, Double "Q", Inc., a partnership operating a coal mine in Claiborne County, Tennessee, maintains that review in this court is de novo as to all factual issues, including whether the violations occurred.

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[1]This view is attributed to the Solicitor General of the United States in the Secretary's brief.

[2]

The Court has reviewed the Act and relevant case law, and finds that the Act requires de novo review only of the amount of the penalties.

Background

From December 1975 through March 1976, federal mine inspectors, on behalf of the Mining Enforcement and Safety Administration of the Department of the Interior (M.E.S.A.) entered Double "Q"'s "Angela No. 1 Mine" in Claiborne County acting under the inspection provisions of the Act. Over this four month period, these inspectors issued a total of twenty-five notices of violations of mandatory health and safety standards promulgated by the Secretary. Each violation was corrected within a short period of time.

M.E.S.A. then proceeded to assess a civil penalty for each violation, as required under the Act, by filing two petitions for assessment of civil penalty [2] with the Office of Hearings and Appeals of the Interior Department. In response to the two petitions, Double "Q" filed answers requesting an administrative hearing on the merits of the violations listed in both petitions.

The administrative hearing was held in Knoxville on October 27, 1976. M.E.S.A. was represented at the hearing by counsel from the Department of the Interior's Regional Solicitor General's Office in Atlanta, and Double "Q" was represented by the same counsel that represented it before this Court in the present action. The burden was on M.E.S.A. at that hearing to establish that the violations did occur. The Administrative Law Judge rendered his

[2] Two administrative cases were involved here, the first dealing with the violations occurring in 1975, and the second covering the violations which occurred in 1976.

decision on February 4, 1977, finding that [3] all twenty-five violations had been proved and ordering Double "Q" to pay a certain penalty for each violation, ranging from $30.00 to $100.00, with the total civil penalty amounting to $1,823.00. An appeal of this decision was dismissed and another order was entered, dated March 30, 1977, ordering that the total amount of $1,823.00 be paid within thirty days. After the thirty days expired, attempts by the local United States Attorney to have the overdue fine paid failed. A petition for enforcement of the order was filed in this Court on September 1, 1977. After setting aside an erroneous default judgment, the Court granted Double "Q"'s request for a jury trial. At this point the crucial question became, as stated previously, what issues should be submitted to the jury. The Court announced its ruling prior to trial and this Memorandum Opinion is filed to explain the Court's rationale.

Civil Penalty Section

Section 819(a)(1) of Title 30 of the U. S. Code requires the Secretary to assess a civil penalty against the operator of a coal mine in which a violation occurs of a mandatory health or safety standard. Each violation of these standards may constitute a separate offense, and the penalty for each offense cannot exceed $10,000. This subsection mandates six criteria for the Secretary to consider in determining the amount of the penalty:

(1) the operator's history of previous violations;

(2) the appropriateness of such penalty to the size of the business of the operator charged;

(3) whether the operator was negligent;

(4) the effect on the operator's ability to continue in business;

(5) the gravity of the violation; and

[4]

(6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Subsection (a)(3) gives the person charged with a penalty the right to a public hearing, after which the Secretary must render a written decision containing findings of fact and setting the amount of penalty for each violation proved.[3]

Subsection (a)(4) is the foundation for the present proceeding. It reads as follows:

"(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside

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[3]This subsection was at issue in **National Coal Operators Ass'n. v. Kleppe**, 423 U.S. 388 (1976). The Supreme Court ruled that formal findings of fact are required only when a hearing is requested.

in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals under section 816 of the title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph."

[5]

Focusing on the fourth, fifth and sixth sentences of this subsection, the following observations are pertinent. The power of the Court is limited in the fourth sentence, to entering a judgment;

(1) enforcing; or

(2) modifying, and enforcing as so modified; or

(3) setting aside in whole or in part the order and decision of the Secretary.

Additionally, the Court may "remand the proceedings to the Secretary for such further action as it may direct." This language is very similar to the language describing the power of appellate courts in reviewing orders of the Secretary in Section 816(b) of Title 30.[4] This type of re-

[4] 30 U.S.C. § 816(b) provides:

"Evidence; conclusiveness of findings; orders

(b) The court shall hear such petition on the record made before the Secretary or the Panel. The findings of the Secretary or the Panel, if supported

(Continued on next page)

view power is commonly associated with a limited scope of review, e.g., Section 816(b) specifically limits factual review to a "substantial evidence" test. Furthermore, remanding the proceedings for further action would not appear to be a proper disposition of the action if every determination made in the administrative proceedings had to be reached de novo in the district court.

The fifth sentence of this subsection requires the District Court to determine de novo "all relevant issues" except issues of fact which were or could have been "litigated in review proceedings before a court of appeals under Section 816." The

[6]

only way issues of fact can be "litigated" in the appellate courts is under the "substantial evidence" test. It would be inconsistent, if not unfair, for Congress to have the standard of review vary depending on the fortuity of the type of order which is at issue.[5] It would appear that Congress logically intended to have facts of the same type as those reviewed by appellate courts, under Section 816, reviewed under the same standard of review in the district courts under Section 819. This would make the substitution provision, whereby facts litigated, or those that could have been litigated, under Section 816 are bind-

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[4](Continued) by substantial evidence on the record considered as a whole, shall be conclusive. **The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary or the Panel for such further action as it may direct.**" (Emphasis Added)

[5]Orders to withdraw all miners pending termination of an imminent danger are reviewable by Courts of Appeals under Section 816. Orders to pay civil penalties because of violations of mandatory standards, including violations for which no withdrawal order was issued, are reviewable in district courts under Section 819.

ing in District Court, a logical provision to prevent the duplication of judicial proceedings.

This conclusion leaves the Court with the problem of explaining the meaning of the language referring to de novo review. An answer to the problem would be apparent if there was a kind of factual determination which is presented in the enforcement proceeding in District Court that would never be reached in the appellate review process. If there was a kind of factual determination reached only in district court proceedings under Section 819 proceedings and if, for some reason, it would warrant special consideration such that de novo review would be logical, then Congress could logically have intended to apply a different scope of review only to that kind of factual determination.

[7]

One factual determination necessary in an enforcement proceeding in District Court that would never be considered in the appellate process is the determination of penalties. By leaving the amount of civil penalties subject to de novo review, Congress was offering protection to the offender where it is most important, his pocketbook. At the same time other factual findings made during the extensive administrative procedures are subject only to a substantial evidence review, thereby encouraging the full use of the administrative procedures set up under the Act.

In reaching the de novo decision on the penalties, the trier of fact in the District Court is bound to follow the six criteria enumerated in the statute. This procedure is consistent with the earlier language in this subsection that refers to this action as an "enforcement" proceeding as opposed to a "civil action" which contemplates the usual, completely de novo trial.

Finally, the sixth sentence of this subsection gives the Court the power to determine the amount of the penalty based on the jury's findings. Reading the Act as a whole, and considering the jury's usual role in determining dollar amounts of liability, the Court is of the opinion that this provision allows the Court a limited review of the jury's verdict, setting it aside only when a reasonable range was violated, based on what a rational person could conclude as to the facts.

The issue presented in this interpretation of the statute, as far as the Court can determine, is a question of first impression. There is support for the Court's position, albeit dictum, in at least two appellate court opinions. See *National Coal Operator's Ass'n. v. Kleppe*, 423 U.S. 388 (1976) (Burger, C.J., for a unanimous court); and *Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277 (4th Cir. 1974).

[8]

In the Coal Operators' decision, Chief Justice Burger referred, more than once, to the enforcement proceeding authorized in this statute as an entitlement to a trial de novo as to the amount of the penalty. The initial sentence of the opinion refers to a civil penalty as "being enforceable only by way of a subsequent judicial proceeding in which the operator is entitled to a trial *de novo* as to the *amount* of penalty." (Emphasis added). Id., at 390. Later in the opinion reference is made to the operator's option, upon having a penalty assessed, to "obtain *de novo* judicial review of the *amount* of the penalty by refusing to pay it and awaiting the Secretary's enforcement action in the district court." (Emphasis added). Id., at 396. While these portions of the opinion obviously lend support to the interpretation presented herein, the Supreme Court specifically noted that it was not deciding the question on

the merits. Id., at 393, n. 3. But it is apparent that the Supreme Court was aware of the problem which would be presented to district courts if all of the issues in these coal cases were to be tried de novo.

Presumption Against De Novo Review

Absent specific requirements to the contrary, courts will presume that administrative proceedings are not subject to de novo review. See *Chandler v. Rouderbush*, 425 U.S. 840, 861 (1976). In the present case the Act does not clearly require de novo review of both the penalties and the facts concerning the violations. The administrative record developed below is voluminous and includes, among other items, 126 pages of transcript of the hearing. The Court is of the opinion that it would frustrate these extensive administrative procedures if the entire administrative record was to be completely

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disregarded whenever a respondent failed to pay an assessed penalty, thereby forcing the Secretary to file a petition for enforcement of the assessment order in a district court. However, de novo review of the amount of the penalty would serve to protect the operators in that the actual amount of the penalty could be redetermined ethier by a jury of his peers or by the Court.

Legislative History

Review of the legislative history affords little additional insight. The initial Senate Bill (S. 2917) contained the specific requirement that review in the district court was, as to all factual issues, only a "substantial evidence" review. 115 Cong. Rec. 28256 (1969). Next the House passed an amended version of the Senate Bill (H.R. 13950) which failed to mention a standard of review, referring

only to a "civil action . . . to collect the penalty." 115 Cong. Rec. 32064 (1969). The Bill reported out of conference is what appears in the Code now. The Conference Report simply rephrases the language that appears in the statute. The final bill no longer refers to a "civil" action" but terms the proceeding as one of "enforcement". In light of the failure to specifically include language requiring complete de novo review of all the facts, the Court believes a reasonable interpretation of the Act is that Congress meant to provide for de novo review of the factual conclusion required in order to assess a penalty and of the amount of the penalty, and for substantial evidence review of the underlying administrative record wherein the violations are determined to have been proved or not proved.

Review of the Record Below

The Court has reviewed the administrative record below and has found substantial evidence, on the record as a

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whole, to support the factual conclusions of the Secretary that the violations did occur.

Conclusion

For the foregoing reasons, it is ORDERED that the Secretary's finding that twenty-five violations occurred in the mine operated by this respondent, be and the same hereby is affirmed. It is further ORDERED that, because the jury's findings as to the amount of penalties are reasonable, the findings of jury on the amount of the penalties be, and the same hereby are, entered as the final judgment in this enforcement proceeding.

Order Accordingly.

/s/ ROBERT TAYLOR
United States District Judge